Supreme Court, U.S.
FILED
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(3)

No. 02-1270

In The Supreme Court of the United States

Steven E. Perlman, *Petitioner*

v.

United States Department of Justice, *Respondent*

After Decision on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

Steven E. Perlman
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Pro Se

PETITION FOR REHEARING

On February 24, 2003, I submitted a petition for a writ of certiorari ("Petition") to the United States Court of Appeals for the Second Circuit ("Second Circuit") in Perlman v. U.S. Department of Justice, 312 F.3d 100 (2d Cir. 2002) ("Perlman"). On April 5, 2004, the Court granted the Petition and ordered that the decision of the Second Circuit in Perlman be vacated and remanded for further consideration in light of National Archives and Records Administration v. Favish et. al., 541 U.S. ___, 124 S.Ct. 1570 (Mar. 30, 2004)(Slip Op. R-35, Docket 02-954) ("Favish"). Pursuant to Rule 44, I respectfully petition the Court for rehearing with respect to its order to remand this case to the Second Circuit. All terms defined in the Petition are hereby incorporated by reference.

I am petitioning for rehearing because Favish does not address the questions posed in the Petition, nor does it provide a basis for altering the decision in Perlman.

One of the two questions posed in the Petition challenges the Second Circuit's finding that the Report of Investigation (ROI) requested through FOIA in this case was compiled for purposes of law enforcement. Favish does not touch upon this issue and does not shed any light on it for the Second Circuit's consideration.

The other question posed in the Petition concerns the proper test to be applied in balancing the public interest in disclosure against the privacy interests of witnesses and third parties under FOIA Exemption 7(C). This question is related to the issue considered by the Court in Favish, but picks up where Favish left off.

The Court held in Favish that when a FOIA requester asserts a public interest in exposing alleged impropriety by the Government "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (Favish, 124 S.Ct. at

1581, Slip Op. at 16). The Court adopted this as a "less stringent standard" (*id.* at 1582, Slip Op. at 16) than the prior requirement of "clear evidence" needed to displace the normal "presumption of legitimacy accorded to the Government's official conduct." (*id.* at 1581, Slip Op. at 16) The Court held that "[o]nly when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records" (*id.* at 1582, Slip Op. at 16).

In Perlman, a case decided prior to the adoption by this Court of the less stringent Favish standard, the Second Circuit identified evidence of wrongdoing as one of several key factors to be analyzed in determining whether a document should be released. It found "a substantial amount of evidence" of the alleged wrongdoing that weighed in favor of release (Perlman, 100 F.3d at 107-08). There was no less evidence of wrongdoing found in Perlman than would be required by the standard of Favish, i.e., enough to believe that the impropriety "might have occurred." If anything, the Second Circuit's finding of "a substantial amount of evidence" is akin to the more stringent, pre-Favish standard of "clear evidence." Moreover, newly obtained evidence, discussed below, constitutes an actual investigative finding of wrongdoing, and not mere evidence of alleged wrongdoing.

The issue raised in the second question of the Petition, concerning the proper balancing test to be used in weighing the privacy interests of witnesses and third parties against the public interest in exposing alleged wrongdoing by the Government, was not addressed in Favish. The Court noted that "the balancing exercise in some other case might require us to make a somewhat more precise determination . . . We need not do so here, however." (Favish, 124 S.Ct. at 1582, Slip Op. at 16-17).

The present case is precisely such a case in need of a more precise determination. The Second Circuit balanced the privacy interests of witnesses and third parties against the public interest, but merely stated it as a conclusion that their identities provided little information of public interest as weighed against their privacy interests and the public interest in having them testify (see Perlman, 100 F.3d at 106). The Second Circuit then applied a detailed balancing test with respect to the target of the investigation. Contrasting the two balancing exercises conducted by the Second Circuit evidences that its test for witnesses and third parties was lacking.

The Court's decision in Favish does not shed any additional light on this subject. On the contrary, the Court stopped at the water's edge in Favish and explicitly declared that there was no need to go any further in that case. Therefore, reconsideration of this case in light of Favish could not lead the Second Circuit to any greater clarity in its formulation.

The need to go beyond the water's edge is acute in the present case. The Court expressed concern in Favish for innocent witnesses who become involved in law enforcement investigations "by happenstance" (Favish, 124 S.Ct. at 1577, Slip Op. at 10). However, in the present case, the witnesses and third parties in the EB-5 investigation did not become involved "by happenstance." These "witnesses" were mid and senior level officials of the Government who were deeply involved in the EB-5 program as Virtue's superiors, peers and subordinates. These "third parties" were described in the ROI as "suspect" investment partnerships whose "severely flawed and unqualified" petitions were approved by INS through undue influence (JA 112-13).

Although never charged in any law enforcement proceeding, these "witnesses" and "third parties" were not devoid of responsibility for the events in question,

and none was a mere bystander. On the contrary, the record demonstrates that all were active participants, whether intentionally or not, in a pervasive scheme of wrongdoing within the Government that remains somewhat shielded from scrutiny to the present day.

Moreover, recently obtained evidence indicates that the alleged wrongdoing by the target of the investigation not only "might have occurred," but in fact, was explicitly found to have occurred by the Office of the Inspector General ("OIG") of the U.S. Department of Justice ("DOJ"). As indicated in the attached Exhibit II, this evidence was only released by the OIG FOIA Unit in response to the Second Circuit's decision in Perlman, long after the Petition was filed with this Court.

The attached portion of the OIG Complaint Form (Exhibit III) served as an internal summary of the OIG investigation of this matter. Upon conclusion of the investigation, this form was finalized to indicate whether the allegations against the target of the investigation had been "substantiated." The answer to this question was originally redacted on grounds of FOIA Exemptions (6) and (7)(C) (see Exhibit I). However, in light of the decision in Perlman, the redaction was removed to reveal the letter "Y," shorthand for "Yes." This was the most fundamental investigative finding that could be reached.

Throughout the proceedings in the courts below, DOJ's central and oft-repeated contention was that the ROI should not be released because it did not "contain" a finding of deliberate wrongdoing by Virtue (see *eg.*, Robinson Declaration, JA 108). It is now clear that this contention by DOJ was literally true, but highly misleading. We now know that the ROI did not contain an explicit finding of wrongdoing because OIG did not put the finding there, where it belonged.

The action of OIG in excluding its key investigative finding from its own official Report of

Investigation is not consistent with a presumption of legitimacy in official conduct. DOJ's attempt to bootstrap on this pretermission as a basis for refusing to release the ROI to the public is similarly inconsistent with the presumption of legitimacy.

In sum, the record evidences that there was a pervasive scheme of manipulating the administrative adjudication arms of the (former) INS in order to produce windfall profits from the sale of bogus investments to alien investors, wrongly entitling these aliens to U.S. permanent residence. The scheme achieved outstanding success in thousands of cases over several years. The ROI evidences that at least one senior INS official played a significant role in allowing this scheme to prosper. The attached evidence demonstrates that the OIG found the allegations of impropriety against this official to be "substantiated," but did not state this in the ROI. OIG and DOJ then opposed release of the ROI on grounds that it did not "contain" any such finding.

CONCLUSION

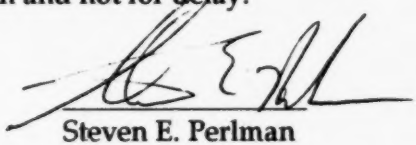
The standard required by Favish has already been met, due to wrongdoing by the (former) INS, OIG and DOJ. Beyond this point, Favish does not provide the additional guidance that would be needed by the Second Circuit to reconsider this case. Therefore, the Court should not remand this case to the Second Circuit.

Respectfully submitted,
Steven E. Perlman
551 Fifth Avenue, Suite 615
New York, NY 10176
Tel: (212) 376-8000
Pro Se

April 30, 2004

Certification of Pro Se Petitioner

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.



April 30, 2004 Steven E. Perlman

EXHIBITS TO

PETITION FOR REHEARING

EXHIBIT I

Details:
Complainant provided information relating to initial INS approvals of (EB-5) Investor Visa petitions submitted by [redacted] American Immigration Services (AIS). AIS claims a 100% success rate for obtaining EB-5 visas and claims that its investment program have INS approval. [redacted]

Complainant further alleges that the AIS investment program itself is suspect. Normally, a $500,000 investment is required to qualify for the EB-5 Visa. However, with the AIS investment program allegedly the investor puts down only $125,000 and a promissory note for $375,000. This note is "secured" by investor assets as per INS requirements. The payment structure on the note is such that the investor pays nothing but the interest for four years. Most of the money remains in the limited partnership (controlled by the General Partnership) without going to the factory or whatever company is the beneficiary of the funds. Then, at the end of five years (after the conditions have been removed), the investor has the option to get out of the investment before the final major balloon payment of about $300,000 is due. At that point in time the option is up to the investor. In the meantime, the investor has secured Legal Permanent Residence (LPR) status with the $125,000 down payment.

DISPOSITION DATA: Office: WA Date: 02/20/1998 Disposition: I Approval: CTH
Referred To Agency: Component: INS
Fee Case: X Civil Rights: N Priority: Y
Other Number: Consolidated Case Number:
Remarks:
REQUESTING ADDITIONAL BACKGROUND INFORMATION AND DOCUMENTS RELATING TO "E" VISAS AND AIS.

CASE INFORMATION: INVESTIGATION TYPE: Investigation
Assigned to: WA Investigat[redacted] Total Hours Used: 1127.0
Received Date: 02/18/1998 Date Created: 02/20/1998 Date Last Modified: 11/01/1999
Status Code: CLCR Close Date: 10/25/1999 Substantiated[redacted]
Shared Investigation?: Other Agency:
Admin Activity?: Y Judicial Activity?: Y

CASE STATUS:
Case assigned to SA[redacted]

S[redacted]has reviewed printed materials made available by complainants and has received additional materials to be reviewed.

08/04/98: [redacted] regarding [redacted]

8/10/98: SA[redacted]conducted interviews of two primary

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EXHIBIT II

August 26, 2003

Steven E. Perlman, Esq.
Suite 615
551 Fifth Avenue
New York, New York 10176

Subject: Freedom of Information/Privacy Act Request [02-OIG-46]

Dear Mr. Perlman:

This letter is in reference to your February 15, 2002, Freedom of Information Act (FOIA) request submitted jointly with Douglas Pasternak to the Office of the Inspector General (OIG), seeking documents related to the OIG's investigation regarding "the EB-5 visa program." As you are aware, in July 2002, the OIG processed your request, releasing certain material to you and withholding other material. You appealed the OIG's action to the Office of Information and Privacy (OIP). In June 2003, OIP remanded your request to OIG for reprocessing in light of the Second Circuit's decision in Perlman v. United States Dep't of Justice, 312 F.3d 100 (2002).

The OIG has completed the reprocessing of your request. Enclosed is the additional material the OIG has determined is responsive to your request and for which no FOIA exemption is being asserted. Certain information has been redacted from this material pursuant to FOIA exemptions 5, 6, and 7(C), 5 U.S.C. §552(b)(5),(b)6, and (b)(7)(C), as amended. The applicable exemptions for the redactions are indicated on the documents themselves. In addition, 65 pages of material continue to be withheld in full pursuant to the same exemptions. Please note that in making this release, the OIG has taken into consideration the privacy waivers your attorney submitted in connection with the FOIA request that was the subject of the Second Circuit decision.

If you are dissatisfied with my action on this request, you may appeal from this partial denial by writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530, within 30 days of your receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in

the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is also where the records you seek are located.

Sincerely,

Deborah Marie Waller
Paralegal Specialist
Office of the General Counsel

EXHIBIT III

Details:
Complainant provided information relating to initial INS approvals of (EB-5) Investor Visa petitions submitted by [redacted] American Immigration Services (AIS). AIS claims a 100% success rate for obtaining EB-5 visas and claims that its investment program have INS approval. Complainant advised that the access to high level INS personnel given to [redacted] as well as the perception that he could choose which INS office to bring his investment program, gives at least the appearance of impropriety on the part of INS employees.

Complainant further alleges that the AIS investment program itself is suspect. Normally, a $500,000 investment is required to qualify for the EB-5 Visa. However, with the AIS investment program allegedly the investor puts down only $125,000 and a promissory note for $375,000. This note is "secured" by investor assets as per INS requirements. The payment structure on the note is such that the investor pays nothing but the interest for four years. Most of the money remains in the limited partnership (controlled by the General Partnership) without going to the factory or whatever company is the beneficiary of the funds. Then, at the end of five years (after the conditions have been removed), the investor has the option to get out of the investment before the final major balloon payment of about $300,000 is due. At that point in time the option is up to the investor. In the meantime, the investor has secured Legal Permanent Residence (LPR) status with the $125,000 down payment.

DISPOSITION DATA: Office: WA Date: 02/20/1998 Disposition: I Approval: CTH
Referred To Agency: Component: INS
Fee Case: X Civil Rights: N Priority: Y
Other Number: Consolidated Case Number:
Remarks:
REQUESTING ADDITIONAL BACKGROUND INFORMATION AND DOCUMENTS RELATING TO "E" VISAS AND AIS.

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Status Code: CLCR Close Date: 10/25/1999 Substantiated?: Y
Shared Investigation?: Other Agency:
Admin Activity?: Y Judicial Activity?: Y

CASE STATUS:
Case assigned to SA [redacted]

S[redacted] has reviewed printed materials made available by complainants and has received additional materials to be reviewed.

08/04/98: [redacted] regarding [redacted] ot [redacted]

8/10/98: SA [redacted] conducted interviews of two primary